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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 560

ERNEST MICHAEL SCHINO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Ernest Michael Schino, hereinafter called "petitioner", respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed a conviction of the petitioner in the District Court of the

United States for the Northern District of California, Southern Division, for a conspiracy to defraud the United States (18 U.S.C. 88, old; 18 U.S.C. 371, new).

OPINION BELOW.

The opinion of the Court of Appeals (R. 1725-1742) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 2, 1953 (R. 1743) and the petition for rehearing in said Court, which was filed on December 29, 1953, was denied on January 4, 1954 (R. 1744).

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Section 37(b)(2) of the Rules of Criminal Procedure for the United States District Courts.

QUESTIONS PRESENTED.

1. Whether the indictment alleges facts (as distinguished from conclusions of law) sufficient to constitute a conspiracy to defraud the United States?

2. Whether the denial of a motion for bill of particulars constitutes error only where the defendant in the course of the trial claims or evidences surprise and requests or shows a need for a continuance?

3. Whether the refusal to grant a timely-made motion for a continuance of the trial date of a case involving corruption in the Bureau of Internal Revenue scheduled to commence (and actually commencing) at a time when hearings of the King Committee (Subcommittee on the Administration of Internal Revenue Laws of the Ways and Means Committee of the House of Representatives) covering corruption in the Bureau of Internal Revenue and the very charges involved in the indictment are to be conducted (and were conducted) in the very same city and the very same building in which the trial itself was to take place (and did take place) deprived the accused of a fair trial?

4. Was the unprovoked closing argument of the prosecutor in the following words:

> "Let me say this to you on the matter: You've got to think about this, this is your business just as much as it is mine, and I am beginning to think *it is a good deal of the business of all of us to get started sometime to get into this mess,* and the longer you put it off the worse it is going to get."

in the light of the atmosphere (preconception of guilt) engendered by the King Committee hearings and the nationwide publicity given the subject of corruption in the Bureau of Internal Revenue so prejudicial as to deprive the accused of a fair trial?

5. Where evidence which is prejudicial to the accused is erroneously admitted, and it cannot with reasonable certainty be shown that the harm has been undone by cautionary instructions to the jury to disregard such evi-

dence, must the conviction be affirmed because the accused made no motion for a mistrial?

STATUTES INVOLVED.

Title 18, U.S.C., Sec. 88 (old):

"*If two or more persons conspire* either to commit any offense against the United States or *to defraud the United States in any manner or for any purpose,* and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be (punished as in such statute provided)." (Italics ours.)

Title 18, U.S.C., Sec. 371 (new):

"*If two or more persons conspire* either to commit any offense against the United States, or *to defraud the United States, or any agency thereof in any manner or for any purpose,* and one or more of such persons do any act to effect the object of the conspiracy, each shall be (punished as in such statute provided)." (Italics ours.)

SUMMARY STATEMENT OF MATTERS INVOLVED.

In seeking a reversal of the judgment of conviction in this case, petitioner, in the Court of Appeals, assigned many errors in the trial Court. These may be summarized as follows:

1. Insufficiency of the indictment;
2. Denial of request for bill of particulars;

3. Refusal of a continuance because of the approaching pendency of hearings before the King Subcommittee of the Congress of the United States which would be in progress during the trial proper and which bear upon the subject of corruption in the Bureau of Internal Revenue at San Francisco and many matters involved in the trial;

4. Improper remarks of the prosecuting attorney in the argument to the jury;

5. Insufficiency of the evidence to support the verdict;

6. The erroneous admission of evidence for which no foundation had been laid and which was in nowise connected with the petitioner or the charge laid in the indictment; and

7. The harm resulting from evidence which was erroneously admitted and so prejudiced the petitioner as to be incurable by cautionary instructions to the jury after striking such evidence.

The indictment charges that the petitioner, together with one Hartmann and one Mooney, co-defendants, and Gertrude Jenkins, an unindicted co-conspirator, did conspire together, with the intent and purpose to defraud the United States in the exercise of its governmental powers, by impairing, obstructing and interfering with the lawful function of the United States, to-wit, the Bureau of Internal Revenue of the Treasury Department, by attempting corruptly to influence and prevent the said Bureau of Internal Revenue from proceeding civilly against said Gertrude Jenkins and prosecuting her criminally for income taxes due, owing and unpaid by her to the United States.

The essence of the scheme, as developed by the government's evidence, and taking the view most favorable to the government, is as follows:

Gertrude Jenkins, a convicted abortionist, was in tax difficulties. She contacted Hartmann who told her that he could get it "fixed" for $5,000 so that she would not be criminally or civilly prosecuted. Hartmann contacted Mooney, a deputy of the Collector of Internal Revenue for the State of Nevada, and asked him if he knew petitioner Schino, Chief Field Deputy of the Collector of Internal Revenue for the First District of California. The answer was affirmative. Schino, at the request of Mooney, inquired of the deputies in the Office of the Collector handling the case of Gertrude Jenkins as to the status of the same and they were informed that the case had been closed. This was the only direct evidence of any inquiry on the part of Schino within the Office of the Collector as to the tax case of Gertrude Jenkins. At about this same time Mooney took Hartmann to meet Schino. In exchange for Hartmann's promise to "fix" the case, Gertrude Jenkins was to pay $5,000 to Mooney for worthless shares of stock in the Mountain City Consolidated Copper Co., a corporation controlled by Mooney. This money she paid to Mr. Mooney but received no stock in exchange therefor. There is serious conflict in the testimony of Mooney and Hartmann as to whether or not Schino was to receive any share of this $5,000. However, there was evidence in the record that Mooney had caused 5,000 shares of the company which he controlled to be issued in the name of Julia Bareilles, Schino's sister. There is no evidence in

the record which shows that either Schino or his sister ever received the certificate evidencing these shares. There is conflict in the testimony of Hartmann and Mooney as to what happened to this certificate, but the evidence clearly discloses that neither Mooney or Hartmann ever gave the certificate to Schino or his sister. There was some evidence in the record that Mooney had had a conversation with Schino in which Mooney told Schino that he wanted to give him 5,000 shares of stock but that it would be preferable not to have this stock in Schino's name and that Schino then suggested to Mooney that the stock be put in the name of his sister. Schino did not deny that the aforesaid conversation with Mooney could have taken place but testified that he had no recollection of such a conversation.

These are the fundamental facts involved in the proof presented during the course of the trial and while petitioner still adheres to the sincere belief that a review of the properly admissible evidence in the light most favorable to the government would disclose the evidence to be so lacking in probative character as to completely fail to show any hypothesis upon which guilty knowledge and participation with guilty knowledge in the conspiracy on his part could be reasonably inferred, he is mindful of the disposition of this Court not to pass upon the merits of the evidence and will, therefore, limit the remainder of this summary to those matters which directly pertain to the questions involved in this petition. However, in order that this Court, in the consideration of these questions, may appreciate the extreme closeness of this case,

your petitioner respectfully directs this Court to the following statement made by the trial judge in his ruling on the motion for a new trial:

> "* * * It is arguable that the evidence against the defendant Schino is not as strong and convincing as the evidence against the other two defendants, but the weight of the evidence was a matter for consideration of the jury." (R. 1702.)

> "* * * Though there is a certain discretion vested in the court in passing upon a motion for a new trial which is not present in ruling upon a motion for an acquittal, that discretion is qualified and limited. The line is moved over but the line is still there. I may not resolve the question by stating that there is the possibility that an innocent man has been convicted, because the possibility of error is inherent in every verdict. Neither is it controlling that I or someone else who heard the evidence may have a reasonable doubt as to guilt. The jury was without a reasonable doubt. The duty of passing upon credibility and weight of evidence and the ultimate fact of guilt or innocence was theirs. If I had an appositive reaction to the evidence from that of the jury, I should not and must not substitute mine. If I did do so I would be interfering with the right of trial by jury. I must not nullify the jury's verdict unless I can say that there has been a miscarriage of justice, which means that the evidence bears no reasonable or rationable inference of guilt. I am unable to reach such a conclusion." (R. 1704-1705.)

Petitioner was convicted, after a jury trial, and sentenced to imprisonment and fine. (R. 1708.)

The sufficiency of the indictment was attacked by motion to dismiss (R. 9-11) and motion in arrest of judgment. (R. 88.) Both motions were denied. (R. 18 and R. 97.)

Petitioner's motion for bill of particulars, seasonably made (R. 6-9), was denied. (R. 18.)

Counsel for petitioner, on the 24th day of January, 1952, moved for a continuance of the trial date for a period of not less than two weeks from and after February 11, 1952, upon the ground that at the time fixed for the trial of the instant case public hearings were to be held in the same city in which the trial was to be conducted by the King Committee (Subcommittee on the Administration of the Internal Revenue Laws of the Ways and Means Committee of the House of Representatives of the United States) concerning the operations and the conduct of the Bureau of Internal Revenue at San Francisco and the parties and the charges involved in the indictment in the instant case. The affidavit of petitioner's attorney in support of this motion for a continuance of the date of trial appears in the appendix hereof.

No traverse was filed to the affidavit of petitioner's counsel. The motion was opposed by the government but no hearing was had thereon and the Court denied the motion. (R. 24.)

During the course of the trial and under the guise of a "similar act" the prosecutor offered to prove, over the vigorous protest of counsel for petitioner (R. 802-808) that petitioner was connected with a "tax fix" with a notorious "madam" and that he had profited thereby through the

acquisition of an interest in a business and manufacturing enterprise known as Safety Step Company. Pursuant to this offer of proof and upon the persistence of the prosecutor, the Court then admitted in evidence the testimony of three witnesses, Dorothy Pennington (R. 811-827), Henry Robinson (R. 827-870) and Lila Campbell (R. 870-887). This testimony was given over a period of two days and covers 76 pages of transcript of record. When completed it fell far short of the offer made and the Court granted a motion to strike this testimony (R. 1021-1023) and instructed the jury to entirely disregard it and treat it as if they had never heard it. (R. 1024-1025.) In addition to this testimony relating to the tax fix of a "madam" the prosecution attempted to connect the petitioner with the tax case of one Sally Rand and this evidence, too, was stricken from the record and the jury instructed to disregard it. (R. 885-887.)

In his closing argument to the jury the prosecuting attorney made the following statement:

> "Let me say this to you on the matter: You've got to think about this, this is your business just as much as it is mine, and I am beginning to think it is a good deal of the business of all of us to get started sometime to get into this mess, and the longer you put it off the worse it is going to get. If those poor little people up in that revenue office up there that you saw march in front of you in the court room and confess they were pushed around by this man——
>
> Mr. Zirpoli. I think that is an improper plea.
>
> Mr. Bourquin. I don't think it is.
>
> Mr. Zirpoli. I think it is.

The Court. Proceed.
Mr. Zirpoli. All right." (R. 1653-1654.)

Before the judgment of the trial Court was entered, petitioner moved for a new trial and among the reasons cited therefor were the following:

1. That the error committed by the trial Court in admitting in evidence the testimony of the witnesses Dorothy Pennington, Henry Robinson and Lila Campbell was such as to irrevocably prejudice the minds of the jurors against petitioner and that the error thus committed was not and could not have been cured by the subsequent order of the Court striking this testimony.

2. That the Court erred in permitting counsel for the government to make an impassioned and prejudicial argument to the jury in the closing moments of the trial relating, in substance, to the so-called mess in the Bureau of Internal Revenue.

3. That the Court erred in refusing to grant the motion of petitioner for a continuance of the trial date until sometime subsequent to the hearings of the King Committee.

4. That the Court erred in denying the petitioner's motion for a bill of particulars.

REASONS RELIED UPON FOR GRANTING THE WRIT.

1. In holding that the indictment in the instant case is not defective the Court of Appeals has decided a Federal question in such a manner as to conflict with the applicable

decisions of this Court and those of Courts of Appeals in other circuits.

United States v. Cruickshank, 92 U.S. 542, 23 L. Ed. 588;

United States v. Hess, 124 U.S. 483, 8 S.Ct. 571, 31 L. Ed. 516;

United States v. Carll, 105 U.S. 611, 26 L. Ed. 1135;

Hammerschmidt v. United States, 265 U.S. 182, 44 S. Ct. 511, 68 L. Ed. 568;

Sutton v. United States, 5 Cir., 157 F.2d 661;

Fuller v. United States, 9 Cir., 114 F.2d 698;

Broadus v. United States, 5 Cir., 30 F.2d 394;

Foster v. United States, 9 Cir., 253 F. 481;

Martin v. United States, 8 Cir., 168 F. 198.

See also:

United States v. Murphy, 50 F. 2d 455;

United States v. Taffe, 86 F. 113;

United States v. White, 69 F. Supp. 562;

United States v. Terranova, 7 F. Supp. 989;

United States v. Eisenminger, 16 F. 2d 816;

United States v. Berger, 9 F. 2d 167;

United States v. Horton, 282 F. 731;

United States v. Geraci, 280 F. 256;

United States v. Dowling, 278 F. 630;

United States v. Beiner, 275 F. 704;

United States v. St. Louis Coffee & Spice Mills, 189 F. 191.

2. In holding that on an indictment for conspiracy to defraud the United States, which is unsupported by a factual recitation from which fraud could be inferred,

the denial of motion for bill of particulars constitutes an abuse of discretion only if the accused claims surprise and requests a continuance, the Court of Appeals has decided a question affecting Rule 7(f) of the Federal Rules of Criminal Procedure probably in conflict with the decisions of this Court and those of the Courts of Appeals in other circuits.

Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457;

Michener v. United States, 8 Cir., 170 F. 2d 973;

McMullen v. United States, Dist. Col., 96 F. 2d 574;

Singer v. United States, 3 Cir., 58 F. 2d 74;

Foster v. United States, 9 Cir., 253 F. 481.

See also:

United States v. Grossman, 55 F. 2d 408;

United States v. Sherwin-Williams Co., 9 F.R.D. 69;

United States v. Yoffe, 52 F. Supp. 175.

3. In holding that the denial of petitioner's motion for a continuance of the trial date under the circumstances existent in the present case was proper, the Court of Appeals has decided a serious Federal question relating to the right of the accused to a fair trial unprejudiced by the hostile atmosphere engendered by a Congressional Committee hearing affecting him and the public office he held in such a manner as to conflict with the applicable decisions in Courts of Appeals in other circuits.

Delaney v. United States, 199 F. 2d 107.

See also:

United States v. Florio, 13 F.R.D. 296.

This is one of the serious problems in the administration of justice presently confronting the judiciary of this nation and should be settled by the Supreme Court.

4. In holding that the closing argument of the prosecutor to which petitioner objected did not constitute prejudicial error the Court of Appeals has decided a Federal question relating to the right of the accused to a fair trial in such a manner as to probably conflict with the decisions of this Court.

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314;

Viereck v. United States, 318 U.S. 236, 63 S. Ct. 561, 87 L. Ed. 734.

5. In holding that prejudicial evidence erroneously admitted, but later stricken with cautionary instructions to the jury to disregard such evidence cannot constitute reversible error in the absence of a motion for a mistrial, the Court of Appeals has decided a Federal question in such a manner as to conflict with the applicable decisions of this Court and those of Courts of Appeals in other circuits.

Kotteakos v. United States, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239;

Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790;

United States v. Sansone, 2 Cir., 206 F. 2d 86;

Pearson v. United States, 6 Cir., 192 F. 2d 681;

Mora v. United States, 5 Cir., 190 F. 2d 749;

United States v. Grayson, 2 Cir., 166 F. 2d 863 (concurring opinion of Circuit Judge Jerome N. Frank).

See also:

Oliver v. United States, 6 Cir., 202 F. 2d 521;
Pierce v. United States, 6 Cir., 86 F. 2d 949.

PRAYER FOR WRIT.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that Court herein, being the case numbered and entitled in its docket as "Ernest Michael Schino, Appellant, vs. United States of America, Appellee, No. 13,375", and that the judgment of that Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, San Francisco, California,
January 27, 1954.

ALFONSO J. ZIRPOLI,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I, Alfonso J. Zirpoli, do hereby certify that the foregoing petition to the best of my knowledge and belief is well founded in law and fact and is not interposed for the purpose of delay.

Dated, San Francisco, California,
January 27, 1954.

ALFONSO J. ZIRPOLI.

In the Supreme Court
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OCTOBER TERM, 1953

No.

ERNEST MICHAEL SCHINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit, rendered December 2, 1953, has not yet been reported. It is printed in full in the Transcript of Record at pages 1725 to 1742, inclusive.

The opinion of the District Court of the United States for the Northern District of California is printed in full in the Transcript of Record at pages 92 to 96, inclusive.

See also, Transcript of Record at pages 1696 to 1709, inclusive.

JURISDICTION.

Petitioner adopts the reasons stated in the petition for writ of certiorari (p. 2 hereof) as supporting the jurisdiction of this Court.

STATEMENT OF THE CASE.

Petitioner adopts the "Summary Statement of the Matters Involved", appearing in the Petition for Writ of Certiorari (pp. 4-11 hereof) as a statement of the case, for the purpose of this brief.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In holding that the indictment is not defective and that it alleged facts sufficient to constitute the crime of conspiracy to defraud the United States.

3. In holding that the trial Court did not abuse its discretion in denying the motion for a bill of particulars.

4. In holding that the refusal to grant the motion of petitioner for a continuance of the trial date did not deprive him of a fair trial.

5. In holding that the closing argument of the prosecutor to which objection was made was proper and in reply

to and was provoked by an argument made by petitioner's counsel.

6. In holding that the erroneously admitted evidence which was subsequently stricken from the record and which the jury was cautioned to disregard was not prejudicial and that the prejudice, if any, was waived by the failure to move for a mistrial.

ARGUMENT.

Specification of Error No. 1.

Specification of Error No. 1 is dependent upon whether petitioner's position can be sustained on any of the remaining numbered specifications of error.

Specification of Error No. 2.

In holding that the indictment in the instant case is not defective and that it alleges facts sufficient to constitute the crime of conspiracy to defraud the United States, the ruling of the Court of Appeals is probably in conflict with the applicable decisions of this Court and those of Courts of Appeals in other circuits.

In *United States v. Cruickshank,* 92, U.S. 542, 558, this Court said:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Archb. Crim. Pr. & Pl. 291. The object

> of the indictment is—*First,* to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, *second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated;* not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." (Italics supplied.)

See also: Authorities cited in the Petition for Writ of Certiorari (p. 12 hereof).

If the above-quoted rule of this Court is still the law, the present case presents an excellent medium for a clarification of the rule by a statement of the *minimum facts* which must be alleged to constitute the crime of conspiracy to *defraud* the United States.

The confusion presently existing among the several circuits as to what constitutes an allegation of facts as contrasted to conclusions of law in an indictment purporting to charge a conspiracy to defraud the United States would thus be alleviated and we would not be faced with the confusion that the Court of Appeals below found itself in when in its opinion in support of the sufficiency of the instant indictment it, too, quoted mere conclusions of law and said,

> "It charges that the appellants 'conspired' (i.e. 'agreed') to defraud the government (unlawful ob-

ject) by attempting corruptly to influence and prevent the Bureau of Internal Revenue from proceeding against Gertrude Jenkins (the means)."

Nor is it clear from the opinion of the Court of Appeals below and its quotation from *Glasser v. United States,* 315 U.S. 60, 66, whether it deems an allegation of the means of effecting the "unlawful object" of a conspiracy to be essential.

The sufficiency of the indictment in the instant case seems to turn on the use of the word, "corruptly".

The primary objection which petitioner makes to the indictment in the instant case is that the use of the word "corruptly" therein is but a mere conclusion of law. See:

United States v. Taffe, 86 F. 113;
Martin v. United States, 168 F. 198, 205;
United States v. Murphy, 50 F. 2d 455;
United States v. White, 69 F. Supp. 562;
Johnson v. United States, 260 F. 783, 786;

and is not a recitation of fact from which the Court could conclude, as a matter of law, that if true, there was an unlawful agreement to compass a criminal purpose.

It is the position of petitioner that if the word, "corruptly" adds nothing to the indictment, that when removed from the language used all that is alleged is "by attempting to influence and prevent the Bureau of Internal Revenue from proceeding civilly against Gertrude Jenkins and prosecuting her criminally for income tax due, owing and unpaid by her to the United States." This is not an allegation of an unlawful purpose. To attempt to influence

or prevent the Bureau from proceeding against an individual to the detriment of that individual cannot be an offense unless the attempt to influence is to be perpetrated in some fraudulent manner, that is to say, by trick, deceit, bribery or the concealment of material facts or at least by means that are dishonest or overreaching of those charged with carrying out the governmental intention.

Hammerschmidt v. United States, 265 U.S. 182, 44 S. Ct. 511, 68 L. Ed. 568.

See also:

United States v. Byers, 2 Cir., 73 F. 2d 419, 422;
United States v. Terranova, 7 F. Supp. 989, 990.

The averment that an act innocent in itself, but criminal if fraudulently done, was done "fraudulently" or "corruptly" or with intent to defraud, is but a bald conclusion of law and is futile.

Martin v. United States, 168 F. 198, 205;
Johnson v. United States, 260 F. 783, 786.

The word "corruptly" is merely a legal conclusion meaning as "being something against law". See:

Hamburg-American Steamship Packet Co. v. U.S., 250 F. 745, 757.

We believe it fundamental in both the civil and the criminal law that the ultimate facts relied upon to show fraud must be pleaded.

If the ruling of the Court of Appeals below is correct, then the mere use of the word "corruptly" in an indictment which charges that the writer of this brief and his client

> "'conspired' (i.e. 'agreed') to defraud the government (unlawful object) by attempting corruptly to influence and prevent" this Court from affirming the decision of the Court below "(the means)"

alleges facts sufficient to constitute a conspiracy to defraud the United States.

This ruling by the Court of Appeals below we do not believe to be in accord with the decisions of this Court or of other Courts of Appeals.

For further authorities, see those cited in Petition for Writ of Certiorari (p. 12 hereof).

Specification of Error No. 3.

In holding that the trial Court did not abuse its discretion in denying the motion for bill of particulars, the Court of Appeals below appears to go on the premise that there can be no abuse of this discretion unless the accused in the course of the trial claims or evidences surprise and requests or shows a need for a continuance. If this be the law, we respectfully submit that this Court should so declare and the confusion which might otherwise result by reason of the previous decisions in the Third and Ninth Circuits in the cases of *Singer v. United States,* 58 Fed. 2d 74, and *Foster v. United States,* 253 Fed. 481, and the other cases cited in the Petition for Writ of Certiorari (p. 13 hereof) may be avoided.

Specification of Error No. 4.

In holding that the denial of petitioner's motion for a continuance of the trial date under the circumstances ex-

istent in the present case was proper, the Court of Appeals has decided a serious Federal question relating to the right of the accused to a fair trial unprejudiced by the hostile atmosphere engendered by a Congressional Committee Hearing affecting him and the public office which he held in such a manner as to conflict with the applicable decisions in Courts of Appeals in other circuits.

Delaney v. United States, 199 F. 2d 107.

See also:

United States v. Florio, 13 F.R.D. 296.

This is one of the serious problems in the administration of justice presently confronting the judiciary of this nation and should be settled by this Court.

In its statement of the facts relating to petitioner's motion for a continuance of the trial date, the Court of Appeals below in its decision made NO reference to the fact that the King Committee hearings were being conducted in the very same city, in the very same building and concurrently with a substantial portion of the trial nor did it refer to the further accepted and universally known fact that corruption in the Bureau of Internal Revenue was the burning issue of 1952. These were unquestionably facts of which the Court of Appeals and the trial Court had judicial notice.

Certainly if a Court could take judicial notice that the "German Library of Information was an agency for the dissemination of Hitler's propaganda in this country", *United States v. Wernecke,* 138 F. 2d 561, certiorari denied 64 S. Ct. 529, 321 U.S. 771, 88 L. Ed. 1066, rehearing

denied 64 S. Ct. 635, 321 U.S. 803, 88 L. Ed. 1089, the Court of Appeals below should have judicially noticed that "corruption in the Bureau of Internal Revenue was the burning issue of 1952." See also *Caroline Products Co. v. U. S.*, 65 S. Ct. 1, 323 U.S. 18, 89 L. Ed. 15, wherein this Court took judicial notice of the Reports of Committees of the House of Representatives and the Senate.

With such judicial notice and the affidavit for a continuance (see Appendix) before it, the ruling of the Court of Appeals below was clearly in conflict with the decision in the *Delaney* case (199 F. 2d 107).

In the *Delaney* case, the hearings before the King Committee commenced in Washington, D. C., on October 16, 1951 and continued through October 22, 1951. The trial of Delaney commenced in Boston, Massachusetts, on January 3, 1952 and continued until January 22, 1952. Thus, a period of approximately 2½ months elapsed between the time of the conclusion of the legislative hearings and the commencement of the trial.

In the instant case the hearings before the King Committee in San Francisco commenced on February 4 and continued through February 21, 1952. The trial commenced in San Francisco on February 11 and continued through to February 29, 1952. Thus *the hearings were being conducted in the very same city, in the very same building and concurrently with a substantial portion of the trial.*

These facts alone engendered a far greater atmosphere of prejudice than those existent in the *Delaney* case.

See:

United States v. Florio, 13 F.R.D. 296, 298.

wherein the Court said:

> "• • • Indeed with reference to the climate which prevailed in this District I had before me a much stronger case for taking some action, for, whereas in Delaney the press coverage had abated some time prior to the actual trial and the problem was whether 'the prejudicial effect of the aforesaid publicity in the newspapers and magazines, over the radio and on television, had so far worn off that the trial could proceed free of the enveloping hostile atmosphere and public preconception of guilt,' *here, the publicity had existed for days prior to the trial and became most intense on the very morning when the jury was to be impaneled.*" (Italics ours.)

Corruption in the Bureau of Internal Revenue became the burning issue of 1952 and one would have to be utterly uninformed or hopelessly naive not to have been aware of the tremendous prejudice engendered thereby. This hostile atmosphere was obviously so great and placed such a heavy handicap on the defendant in establishing his innocence solely on the basis of evidence being presented in his trial, that it would seem neither right nor in harmony with the Sixth Amendment of the Constitution of the United States to make him stand trial while the damaging effect of all that hostile publicity was making its daily imprint on the public mind.

Petitioner Schino's request for a reasonable continuance was even more justified than the request made in the *Delaney* case since it was made prior to the actual hearing

and in anticipation thereof and with full knowledge that that hearing would take place simultaneously with the trial. Under the circumstances, the granting of any reasonable request for a continuance to assure a fair trial was imperative.

The affidavit of A. J. Zirpoli in support of a motion for a continuance of the trial was of necessity predicated upon anticipated dangers. These anticipated dangers were real and materialized in the actual hearings of the King Committee and the subsequent publicity which caused the issue of corruption in the Bureau to so becloud the trial proper as to make it impossible for the jury to determine the guilt or innocence of the accused without prejudice. This prejudice could have been avoided by simple diligence on the part of the Court had it granted the requested continuance.

The extent to which a Congressional investigation, conducted concurrently with the trial of an accused, where the subject matter under investigation pertains to the parties involved in the trial and the corruption with which they are charged, may prejudice the right of the accused to a fair trial is a matter of grave concern to the public, the bench and the bar. Some standards for future guidance should be defined by this Court.

Specification of Error No. 5.

In holding that the closing argument of the prosecutor to which objection was made was proper and in reply to and was provoked by an argument made by petitioner's

counsel, the ruling of the Court of Appeals is probably in conflict with the applicable decisions of this Court.

The objectionable closing argument of the prosecutor was as follows:

> *"Let me say this to you on the matter: You've got to think about this, this is your business just as much as it is mine, and I am beginning to think it is a good deal of the business of all of us to get started sometime to get into this mess, and the longer you put it off the worse it is going to get.* If those poor little people up in that revenue office up there that you saw march in front of you in the court room and confess they were pushed around by this man——
>
> Mr. Zirpoli. I think that is an improper plea.
>
> Mr. Bourquin. I don't think it is.
>
> Mr. Zirpoli. I think it is.
>
> The Court. Proceed.
>
> Mr. Zirpoli. All right." (R. 1653-1654.)

The Court of Appeals referred to this argument in its opinion "as in reply to such an argument as made by Schino's counsel." This observation by the Court of Appeals is NOT supported by the record. It was not in reply to a SINGLE word uttered by Schino's counsel in his argument. A reading of the argument of counsel for Schino (R. 1585-1632) will clearly show this to be true. Nowhere in that argument did counsel for Schino make any reference to the public responsibility of the jury or any "mess" in the Bureau of Internal Revenue. His argument was confined exclusively to the facts presented by the evidence and the consideration that the jury should

give thereto in the light of the expected instructions from the Court.

Not being responsive to invitation or provocation on the part of defense counsel this objectionable closing argument had no proper place in the trial. It must be remembered this was the first trial in this district in the so-called "clean-up" campaign and that when the prosecutor said "I am beginning to think it is a good deal the business of all of us to get started sometime to get into this mess and the longer you put it off the worse it is going to get" he was referring specifically to the "mess" in the Bureau of Internal Revenue and was exhorting the jury to get into it and admonishing them that the longer they put it off the worse it is going to be. It was a deliberate fertilization of the seed of public prejudice and passion already planted by the tremendous publicity given the conduct of the Bureau of Internal Revenue.

It may be conceded that had this trial taken place at a different time and under different circumstances and had this been the only error committed, these utterances of counsel for the prosecution might not have been deemed prejudicial, but this error could not help but be prejudicial when one considers that in February, 1952, the entire nation was passionately aroused and bitterly resentful toward the Bureau of Internal Revenue. The prosecutor was, or at least should have been, aware of the aggravated nature of the prejudice which would follow under such circumstances. It is hard to perceive how anyone could fail to recognize the prejudice which would result from such an argument, but the failure of the prosecutor to be

aware of this fact does not relieve the Court of its obligation to protect the rights of the accused. Counsel for the accused sufficiently apprised the trial Court of his objection and it would have been obvious to any realistic practitioner from the position taken by the Court that a motion for a mistrial would have been denied and would have only aggravated the prejudice already engendered.

See:

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629;

Viereck v. United States, 318 U.S. 236, 63 S. Ct. 561.

Specification of Error No. 6.

In holding that the erroneously admitted evidence which was subsequently stricken from the record and which the jury was cautioned to disregard was not prejudicial and that the prejudice, if any, was waived by the failure to move for a mistrial, the ruling of the Court of Appeals is probably in conflict with the applicable decisions of this Court and those of the Courts of Appeals in other circuits.

The Court of Appeals did not determine whether or not the excluded evidence was prejudicial except to say:

> "Obviously, there was no such overwhelming prejudice that it should be considered at any stage of the proceedings as in Kotteakos v. United States, 328 U.S. 750, where in fact the court's errors were objected to at the trial."

But did this Court in the *Kotteakos* case (or any other case) say that the prejudice must be overwhelming?

In a case as close as this one certainly was, must the prejudice be overwhelming?

We think not, for prejudice like injustice is NOT one of those poisons which, though harmful when taken in large doses, yet when taken in small doses may produce a salutary effect. Prejudice is a dangerous poison even in doses of homeopathic proportions.

What greater prejudice could there be in a case of the nature here involved than the erroneous admission in evidence over the vigorous protest of counsel for the defendant of facts tending to connect the defendant with an infamous "madam" and a notorious fan dancer in an alleged tax fix, even though such evidence is subsequently stricken from the record and the jury instructed to disregard it.

If there was prejudice must the liberty of the accused become a game of chance in which the ability or judgment of counsel becomes the determining factor? Is the equal responsibility of the trial judge to declare a mistrial to be completely disregarded? We think not. For a case in point, we direct this Court's attention to the concurring opinion of Circuit Judge Frank in *United States v. Grayson,* 166 F. 2d 863, 870, wherein he said,

> "I agree that we must reverse for the reasons stated by my colleagues. I would, however, also hold that, even in the absence of the errors which they hold reversible, we should reverse because of (1) the needless use of the alias, and (2) the three instances of testimony, by victims, the admission of which my colleagues describe as improper but which they regard as harmless. Whether any one of those errors standing alone would be enough to require reversal need not be considered. But combined, I think they

deprived defendant of a fair trial; they come within the recent rulings of the Supreme Court defining prejudicial as distinguished from harmless error. The able and conscientious trial judge, patently troubled by this unfairness, once severely criticized government counsel out of the presence of the jury, regularly directed the improper testimony to be stricken, and gave disregarding instructions. I think, however, he should have gone further and declared a mistrial. For the objectionable answers, once given, had such a character that no one can say that the judge's warnings effectively removed their poisonous consequences. Indeed, as experienced trial lawyerss have often observed, merely to raise an objection to such testimony —and more to have the judge tell the jury to ignore it—often serves but to rub it in. I believe that a prosecutor ought not deliberately and repeatedly, as here, put defendant's lawyer in such an awkward dilemma—where his client will suffer if the lawyer does not object or if he does. If, without attaching any practical consequences to such tactics of the prosecutor, we simply express disapproval of them, we do nothing to prevent their repetition at the new trial of this case or in trials of other cases."

Apparently, Appellate Courts, too often, in considering the cold record on appeal, overlook the fact that the trial lawyer is the indispensable link between his client and the jury, thereby making one of his primary concerns the avoidance of tactics which the jury might deem offensive or confessions of weakness such as a motion for a mistrial or a motion for continuance on the ground of surprise. Such motions are only made as a last resort and only when counsel is firmly convinced that the

same will be granted, for when made and denied they only serve to increase prejudice. While the trial judge in granting the motion to strike the objectionable testimony and instructing the jury to disregard the same stated that he was "very much persuaded" that the testimony should not be in the case, nevertheless, it would have been evident to any experienced trial lawyer with a "feel" for the disposition of the trial judge that a motion for mistrial at this juncture, even though well taken, would have been denied and would only have served to further prejudice his client in the minds of the jurors.

The conclusion of the Court of Appeals that the failure to move for a mistrial constitutes a waiver overlooks the "realities" of a trial and places a premium on the trial lawyer, who would with his weather eye cocked on the Appellate Court move for a mistrial on every assigned error regardless of the irrevocable prejudice his conduct might produce in the minds of the jurors.

It overlooks the fact that the error resulted from the unrestrained insistence of the prosecutor upon the admission of incompetent and prejudicial evidence.

It overlooks the equal (if not greater) responsibility of the trial judge in the guidance of the trial to himself declare a mistrial when prejudice results.

It overlooks the past declarations of the Court of Appeals that it will examine a record on appeal to determine whether or not there has been such manifest error as will result in a miscarriage of justice, even though no objection was made in the trial Court and the error is assigned for the first time on appeal.

See:

Smith v. United States, 173 F. 2d 181.

It overlooks the true intent and spirit of the rulings in the following cases:

Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239;

Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716;

United States v. Sansone, 206 F. 2d 86;

Pearson v. United States, 192 F. 2d 681;

Mora v. United States, 190 F. 2d 749;

United States v. Grayson, 166 F. 2d 863;

People v. McKelvey, 85 C.A. 769.

In *Mora v. United States,* supra, the Court said:

" 'The general rule is that if evidence which may have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. Pennsylvania Company v. Roy, 102 U.S. (451) 452, 26 L. Ed. (141) 142; Hopt v. Utah, 120 U.S. 430, 438, 7 S. Ct. 614, 30 L. Ed. 708, 711. But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in Hopt v. Utah (supra). And see Waldron v. Waldron, 156 U.S. 361, 383, 15 S. Ct. 383, 39 L. Ed. 453, 459.'

"In Holt v. U. S., 94 F. 2d 90, 94, the Court of Appeals for the Tenth Circuit held that evidence of

a similar type had probably made such a deep and lasting impression on the minds of the jurors that the instruction of the court to the jury to disregard the evidence did not cure the error in its admission.

"Since there is no substantial evidence against Schmidt apart from the confessions of his co-defendants, the conclusion is inescapable that the jury was unwilling or unable to follow the court's belated instruction to disregard those confessions as evidence against Schmidt. We cannot say with fair assurance that the jury was not substantially swayed by the use of Tangney's confessions against Mora. Fiswick v. United States, 329 U.S. 211, 218, 67 S. Ct. 224, 91 L. Ed. 196; see Federal Rules of Criminal Procedure, Rule 52(a), 18 U.S.C.A."

If, as the Court of Appeals has said, "It is without question true that in a criminal case the ultimate issue is the guilt or innocence of the accused, to be determined by a fair trial and not the competence of counsel" (*Smith v. United States,* supra) counsel's failure to move for a mistrial should not now be deemed to have cured the error which resulted when the prosecutor deliberately injected inadmissible and prejudicial evidence in the case in order to influence the jury. Nor should the prosecutor be heard to say, after he has secured a conviction, it was harmless, for as Justice Jackson said in *Krulewitch v. United States,* supra, at page 453,

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U.S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F. 2d 54."

As we observed in our "Summary Statement of the Matters Involved" appearing in the Petition for Writ of Certiorari (pp. 9-10 hereof), the prejudicial inquiry was pursued through three witnesses over a period of two days and covers seventy-six pages of the transcript of record. The impression conveyed to the minds of the jurors by this irrelevant and prejudicial inquiry was such that one cannot fairly say that it was successfully eradicated by the rulings of the trial judge. Hence, petitioner was clearly entitled to a new trial and his motion therefor should have been granted.

CONCLUSION.

For the reasons stated above, petitioner respectfully requests that his petition be granted.

Dated, San Francisco, California,
January 27, 1954.

ALFONSO J. ZIRPOLI,
Attorney for Petitioner.

(Appendix Follows.)

Appendix

(Title of District Court and Cause.)

AFFIDAVIT IN SUPPORT OF MOTION TO CONTINUE DATE OF TRIAL.

State of California,
City and County of San Francisco.—ss.

A. J. Zirpoli, being first duly sworn, deposes and says:

That he is an attorney at law admitted to practice before the above-entitled Court and is the attorney for Ernest Michael Schino, one of the above-named defendants; that the above-entitled cause has been placed upon the jury trial calendar of the above-entitled Court for trial on February 11, 1952;

That your affiant is informed and believes and according to an official subpoena which he has himself seen the Subcommittee on the Administration of the Internal Revenue Laws of the Ways and Means Committee of the House of Representatives of the United States will hold public hearings in San Francisco, California, in which inquiry will be made as to the operations and conduct of the office of the Collector of Internal Revenue and the Bureau of Internal Revenue at San Francisco, California, and that your affiant is further informed and believes from press releases read by him that the said Subcommittee will inquire, among other things, into matters directly related to the charges contained in the indictment in the above-entitled cause; and your affiant is further informed and believes and according to the aforesaid subpoena which

your affiant has personally seen, the said hearings of said Subcommittee in San Francisco, California, will commence on February 4, 1952 and, according to affiant's information and belief, will continue for approximately two to two and one-half weeks thereafter, making it, therefore, obvious that the hearings of this Subcommittee will be in progress, in part, on the same days as the trial of the above-entitled cause;

That the unprecedented newspaper coverage heretofore given to this Subcommittee, known as the "King Committee" is a clear indication that the hearings of the Committee at San Francisco, California, will receive daily and widespread publicity in the newspapers in San Francisco and throughout all of Northern California; that your affiant is further informed and believes that it is entirely possible that the said hearings will also receive radio and television coverage throughout Northern California and elsewhere;

That an article appearing in the San Francisco Examiner on January 5, 1952, in referring to the agenda of the King Committee, states:

> "High on the Committee's agenda, it was learned, is listed the Mountain City Consolidated Copper Company of Nevada. This concern, as exclusively disclosed by The Examiner six months ago, was controlled by Bureau of Internal Revenue personnel who specialized in the sale of worthless mining stock to persons confronted with income tax difficulties.
>
> "Three men presently are awaiting trial here on charges of defrauding the Government through the alleged sale of Mountain City stock to Gertrude Jenkins, convicted abortionist, who claims she paid

out $5,000 on the understanding she would thereby escape tax fraud prosecution.

"The three men under indictment in the Jenkins transaction are Ernest M. 'Mike' Schino, ousted chief field deputy for the local tax office; Patrick Mooney of Reno, former chief field deputy for the Nevada tax district and secretary of the Mountain City Company, and Martin M. Hartmann, stock salesman for the company.

"Tobin said none of the three would be called as witnesses before the Committee because they are under indictment."

That although the defendants themselves will not, according to the above-quoted article, be called as witnesses, the Committee will inquire into the transactions of Mountain City Consolidated Copper Company of Nevada and it would be most prejudicial to the defendants in this case to have their case tried by a jury simultaneously to a time when the King Committee was, itself, hearing witnesses on matters pertaining to the activities of Mountain City Consolidated Copper Company of Nevada and the operations and conduct of the Bureau of Internal Revenue at San Francisco;

That the purpose of the defendant's request for a continuance is not one of delay but merely to insure him of a trial at a time and under circumstances which will give to him a "fair trial";

That affiant is informed and believes that the hearings of the aforesaid Committee were originally scheduled to open in San Francisco on January 14, 1952; that the date of such hearings was subsequently continued until Janu-

ary 21, 1952, and finally fixed at February 4, 1952 and as affiant has heretofore stated, subpoenas have been issued for appearances before the said Committee commencing February 4, 1952; that immediately heretofore, the trial of the above-entitled cause had been scheduled to commence on January 7, 1952, and your affiant at the request of the Government consented to a continuance of the trial until February 11, 1952, to enable counsel newly designated by the Government to prosecute the case to familiarize themselves with the same and *also because it was deemed advisable not to have the trial of the above-entitled case in progress during the hearings of the King Committee,* which, as above stated, were originally scheduled to commence on January 14, 1952;

That a conspicuous, widespread and sensational newspaper coverage (and possibly radio and television coverage) of the King Committee hearings would, undoubtedly, prejudice the trial of the defendants in the above-entitled cause if they were to be required to go on trial at a time simultaneous to the said hearings.

A. J. Zirpoli,
Attorney for Defendant,
Ernest Michael Schino.

Subscribed and sworn before me this 24th day of January, 1952.

(Seal) Cecile M. Sloane,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission expires Oct. 21, 1952.

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291252—54

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 560

ERNEST MICHAEL SCHINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1725–1742) is reported at 209 F. 2d 67.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1953, and a petition for a rehearing was denied on January 4, 1954 (R. 1743–1744). The petition for a writ of certiorari was filed on January 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment, for conspiracy to defraud the United States by attempting corruptly to prevent the Bureau of Internal Revenue from proceeding civilly and criminally against a delinquent taxpayer, alleged with sufficient particularity the facts constituting the offense.

2. Whether petitioner was entitled to a continuance by reason of anticipated prejudice from public hearings to be held by a congressional committee investigating internal revenue irregularities in San Francisco, partly during the time of petitioner's trial, where the record did not contain a showing of prejudice or that petitioner objected to it during the course of the trial.

3. Whether the prosecutor's summation was prejudicial by reason of improper inflammatory remarks.

4. Whether petitioner, without moving for a mistrial, could properly claim reversible error on the basis that he was not sufficiently protected by instructions to the jury to disregard stricken evidence as having no pertinence.

STATUTE INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of

the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Petitioner and defendants Mooney and Hartmann were charged in an indictment under 18 U. S. C. 371, returned in the United States District Court for the Northern District of California, with conspiring together, and with Gertrude Jenkins, to defraud the United States in the exercise of a lawful function of the Bureau of Internal Revenue by attempting corruptly to prevent the Bureau from proceeding civilly against Mrs. Jenkins and from prosecuting her criminally for evading federal income taxes (R. 3–5). The jury found all three defendants guilty as charged (R. 83, 1694–1695). On appeals by petitioner and Hartmann, their convictions were unanimously affirmed (R. 105–106, 1743). Petitioner alone seeks certiorari.

The evidence supporting petitioner's conviction may be summarized as follows:

In 1946 an investigation of Mrs. Jenkins' income taxes was commenced under the direction of the petitioner, who was then Chief Field Deputy in the office of the Collector of Internal Revenue for the First California District (R. 158, 487, 1432). In 1947, a man named Hartmann, one of the defendants but not a petitioner here, undertook to persuade Mooney, another defend-

ant, who was Chief Field Deputy for Nevada, to "fix" petitioner (186–189, 489). Mrs. Jenkins was to, and did, pay $5,000 to Mooney for which she was to, but did not, receive some worthless mining stock (R. 195–198, 257–260, 1119–1120). Mooney came to San Francisco and conferences took place with petitioner and his agents with respect to the investigation of Mrs. Jenkins' tax affairs (R. 488–493, 1113–1118). In the end, pursuant to arrangements with another revenue agent, wire recordings were made of conferences between Hartmann and Mrs. Jenkins' attorney and the information so obtained frustrated the conspiracy (R. 294, 439–480). Mrs. Jenkins was indicted, tried, and found guilty of tax evasion (R. 222, 240).

ARGUMENT

1. Petitioner's attack upon the sufficiency of the indictment (Pet. 21–25) is without substance.

The true test of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense charged so that the accused may be prepared to meet the charge, and plead a former acquittal or conviction if future proceedings are brought against him for a similar offense. *Hagner* v. *United States,* 285 U. S. 427, 431. It is not essential in a conspiracy indictment to allege with particularity the time, place, circumstances and causes in stating the manner and means of ef-

fecting the object of the conspiracy. *Glasser* v. *United States,* 315 U. S. 60, 66.

The indictment here complied with Rule 7 (c), F. R. Crim. P.[1] Just as this Court held in *United States* v. *Debrow,* 346 U. S. 374, 378, so too in the instant case, "It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged."

The indictment must be read in its entirety, including the overt acts, and not by removing the word "corruptly" from context and labelling it as a mere conclusion of the pleader. The indictment as a whole unmistakably apprised petitioner of the charge that he and his co-conspirators, with intent to defraud the United States, had attempted corruptly to influence and to prevent the Bureau of Internal Revenue from proceeding civilly against Mrs. Jenkins and prosecuting her criminally for failing to pay income taxes of specific amounts and for certain years. The overt acts relied upon were described with particularity. Since the offense charged was that of conspiring to defraud the United States the parties necessarily must have conspired "corruptly" if they conspired at all to defraud. Cf. *Hamburg-American Steam Packet Co.* v. *United States,* 250 Fed. 747, 758 (C. A. 2), certiorari denied, 246

[1] "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need not contain * * * any other matter not necessary to such statement. * * *"

U. S. 662. The indictment contained all the essential elements of the offense so that petitioner was not misled to his prejudice as to the nature of the charge against him.[2]

2. Petitioner's counsel, on January 24, 1952, filed a motion to continue the trial for at least two weeks beyond February 11, 1952, the date the trial began, on the ground that petitioner would otherwise be deprived of a fair trial. In a supporting affidavit counsel referred to anticipated prejudicial publicity from newspaper (and possible radio and television) coverage of the scheduled public hearings in San Francisco by the congressional "King Committee" investigating Internal Revenue irregularities. The affidavit quoted from an article appearing in the

[2] The court below did not make a novel holding, as petitioner implies (Pet. 25), that there can be no abuse of discretion in denying a motion for a bill of particulars unless the accused during the course of the trial claims surprise or demonstrates a need for a continuance. It is true that the court adverted to the trial court's observation that the defendants during the three-week trial, after their motion for a bill of particulars had been overruled, did not request a continuance, although they could have done so if confronted with unexpected evidence. The holding of the court, however, was merely that "Where the record thus shows that the defendants were not taken by surprise in the progress of the trial or that their substantial rights have not been prejudiced in any way by the denial of the bill of particulars, there has been no abuse of discretion" (R. 1729). This ruling was in accord with *Wong Tai* v. *United States*, 273 U. S. 77, 82. See also *N. Y. Central R. R.* v. *United States*, 212 U. S. 481, 497; *Connors* v. *United States*, 158 U. S. 408, 411.

San Francisco Examiner on January 5, 1952, stating that high on the King Committee's agenda was an investigation of Mountain City Consolidated Copper Company of Nevada; that this concern was controlled by Bureau of Internal Revenue personnel who sold worthless stock to persons in income tax difficulties; that petitioner, Mooney, and Hartmann had been indicted and were awaiting trial for defrauding the Government by the sale of some of this stock to Mrs. Jenkins; but that none of these men would testify before the Committee since they were under indictment. (R. 19–23.)

There is no merit in petitioner's contention (Pet. 25–29) that the denial of this motion was erroneous and that the decision below is in conflict with *Delaney* v. *United States,* 199 F. 2d 107 (C. A. 1). The cases are not at all alike. In *Delaney* the hearings had occurred before the motion for a continuance was made and the motion was supported by an imposing array of documents which showed that widespread publicity had been given to accusations of dishonesty against the defendant, both on the matter covered by the indictment and otherwise, and that the chairman had publicly branded Delaney's conduct as a shocking betrayal of trust. Here the motion for a continuance was based on speculation as to what might occur when the committee hearings should be held, although it had already been announced

that petitioner would not testify and the record is silent as to what actually did occur during the period when the trial and the hearings overlapped. It is significant that there is nothing in the record to indicate that defense counsel was troubled by whatever publicity was being given to the hearings while the trial was in progress. There is no showing of any request to question the jurors to determine whether they were cognizant of any prejudicial publicity, and no request for a charge with respect thereto. It would certainly seem that, if the publicity had been such as to render the pending trial unfair, at least one of the three lawyers representing the defendants would have thought of calling the matter to the attention of the trial court. In fact, at the end of two weeks, when the trial was adjourned for a weekend the judge gave a customary instruction against reading newspapers pertaining to the case (R. 1101–1102) and no comments were made by anyone about any special publicity. Consequently the action of the court below, in refusing to speculate on whether or not there had been prejudicial publicity, was entirely proper. Cf. *United States* v. *Moran,* 194 F. 2d 623, 625 (C. A. 2), certiorari denied, 343 U. S. 965, where a request for a continuance, on the ground of prejudicial publicity given to a Senate committee hearing and report, was denied and the court observed: "Neither the Committee's report nor the newspapers' comments on it are

in the record, so that we cannot judge whether they supplied any basis for counsel's apprehension."

3. Petitioner asserts reversible error by reason of alleged prejudicial remarks by the prosecutor in his summation.[3] It is contended that there was

[3] In his closing argument the prosecutor stated (R. 1653–1654):

"Let me say this to you on the matter: You've got to think about this, this is your business just as much as it is mine, and I am beginning to think it is a good deal of the business of all of us to get started sometime to get into this mess, and the longer you put it off the worse it is going to get. If those poor little people up in that revenue office up there that you saw march in front of you in the court room and confess they were pushed around by this man——

Mr. ZIRPOLI: I think that is an improper plea.

Mr. BOURQUIN: I don't think it is.

Mr. ZIRPOLI: I think it is.

The COURT: Proceed.

Mr. ZIRPOLI: All right.

Mr. BOURQUIN: If those poor people like the Christopherson girl, poor little Wulff, and poor McGowan, and the rest of them will see that you ladies and gentlemen, out in the open under no obligation to these people, not afraid of these characters, if they are going to find you will wink at this thing and put it aside, they are going to lose all hope, they are not going to rehabilitate themselves, and you are not going to be fair with them to do that. This isn't your work, but it isn't my work any more than it is yours, this work, * * * but I regard this as a defense of the Government and the people and to defend those little people that have been pushed around by bullies thinking the department is run for themselves and for their own ends; Mooney for his stock, and Schino for his family, or whatever he wants, and Hartmann for stock, or anything else. You have got to make it, look at, to take notice of those things, you've got to fight those things as you heard in this Court if you are going to expect it to stop."

an improper attempt to arouse in the minds of the jurors the public prejudice against the "mess" in the nation-wide operations of the Bureau of Internal Revenue (Pet. 29–32).

Here again petitioner attempts to rely upon a background of widespread adverse publicity regarding the Bureau of Internal Revenue, which was not included in the record and consequently, could not be considered by the court below. *Pacific R. R.* v. *Ketchum,* 101 U. S. 289, 296; *Siano* v. *Helvering,* 79 F. 2d 444, 446 (C. A. 3). Moreover, the challenged remarks do not necessarily refer to a general clean-up of a nation-wide mess, but rather to the local one staged by petitioner and his co-conspirators.

Petitioner's counsel had stated in his closing argument that petitioner never conspired with the others mentioned in the indictment; that he had no intention corruptly to influence or to prevent the collection of Mrs. Jenkins' taxes (R. 1594); that "everything he did was perfectly consistent with the proper discharge of his duties" (R. 1601, 1630); that despite intensive investigations the Government could produce no evidence of an attempt by him to influence the Jenkins case (R. 1607, 1629); and that he made "no effort to influence anyone in any manner, shape or form" (R. 1630). There had been evidence that petitioner had bullied some official subordinates to grant an unauthorized extension of time for filing a tax return and to suppress the

assessment of taxes against a favored taxpayer (R. 892–896, 902–905, 906–908, 911, 925, 977, 930–935, 945–948, 957–960). Since petitioner's counsel had represented him to the jury as an honest and upright public official it was entirely proper for the government prosecutor in response to refer to the mess petitioner and his confederates had created by bullying their subordinates to accomplish their own sinister designs. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 241, 242; *Crumpton* v. *United States*, 138 U. S. 361, 364; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C. A. 2), certiorari denied, 329 U. S. 742; *Ochoa* v. *United States*, 167 F. 2d 341, 344 (C. A. 9).

4. Finally, there is no merit to petitioner's contention (Pet. 32–38) that there should have been a reversal on the ground that the court's direction to the jury to disregard stricken evidence was not effective. Petitioner asserts that the jury was so prejudiced by the evidence, that petitioner had boasted of having another taxpayer's case transferred from Hawaii to San Francisco thus saving money on her taxes, that the trial court's instruction did not protect his rights.[4]

[4] The prosecution offered to show as a similar act that petitioner had boasted of having the case of a Mrs. McCreedy transferred from Hawaii to San Francisco and saving her a lot of money on her taxes, and that petitioner was given a far greater interest than his $100 investment justified in a company formed by the McCreedys (R. 802–806). After

The withdrawal instruction unequivocally directed the jury to disregard the evidence which the court has ordered stricken out.[5] It came at a time when the evidence was fresh in the jury's mind at the close of the Government's case so that there was little possibility of misunderstanding. In these circumstances there was no reversible error involved. It must be presumed that the jurors rendered their verdict by following "instructions too clear and positive to be misunderstood." Cf. *Pennsylvania Co.* v. *Roy,* 102 U. S. 451, 458–459; *Hopt* v. *Utah,* 120 U. S. 430, 438; *Cavness* v. *United States,* 187 F. 2d 719, 722 (C. A. 9); *Metzler* v. *United States,* 64 F. 2d 203, 207–208 (C. A. 9).

The record shows that, at the time of the trial, petitioner's counsel did not object to the court's

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the Government introduced evidence of this the court decided that it was just as compatible with petitioner's innocence as with criminality (R. 1021–1023), and immediately thereafter gave the following withdrawal instruction (R. 1024–1025):

"* * * It is the Court's belief and conclusion that the testimony of those three witnesses in its entirety is of no materiality in this case, and I have granted a motion to strike the testimony of those three witnesses. [Their] testimony * * * is stricken in toto, and you ladies and gentlemen are to entirely disregard that testimony that is stricken and you are to treat it as if you had never heard it. It has no place and no factor in this case."

[5] Also, in the court's final charge the jurors were admonished (R. 1662):

"You must not consider, for any purpose, any evidence * * * which, after being received, has been stricken out by the Court."

withdrawal instruction, and asked for no other relief. If he had appraised this instruction as an insufficient remedy, he could have said so at the time. Cf. *Billiter* v. *United States,* 23 F. 2d 678, 679 (C. A. 6). By continuing with the trial for another week and speculating on a hoped for acquittal, without moving for a mistrial to apprise the trial court of the fact that he considered the incident prejudicially erroneous, petitioner as the court below held (R. 1738) waived his "afterthought contention." Cf. *Carter* v. *State of Tennessee,* 18 F. 2d 850, 853 (C. A. 6); *Webb* v. *United States,* 191 F. 2d 512, 516 (C. A. 10); *McGuinn* v. *United States,* 191 F. 2d 477, 479 (C. A. D. C.); *Jamerson* v. *United States,* 66 F. 2d 569, 572 (C. A. 7), certiorari denied, 290 U. S. 706; *Gerard* v. *United States,* 61 F. 2d 872, 875 (C. A. 7).

CONCLUSION

The case was decided on settled legal principles, and there is no question of importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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